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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	))))	MM Docket No. 92-266
	)	DOCKET FILE COPY ORIGINAL
Leased Access	)	CS Docket No. 96-60

JOINT REPLY COMMENTS OF CABLE TELEVISION OPERATORS

Daniels Communications, Inc.
Greater Media, Inc.
Helicon Corporation
Marcus Cable Partners, L.P.
Prime Cable
Scripps Howard Cable Company
TCA Cable TV, Inc.
Texas Cable and Telecommunications Association
Allen's TV Cable Service, Inc.
Community Antenna Systems
Fibervision, Inc.
Halcyon Communications, Inc.
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SUMMARY

Most of the comments in this proceeding confirm the original position of the Joint Commenters that the proposed maximum rate formula is unreasonably low. The proposed formula does not adequately compensate the cable operator because it fails to include important real costs and other legally cognizable harm incurred by the operator when leased access programming is added to the cable system, particularly when the cable operator is forced to replace existing programming services. No evidence has been submitted to support the Commission's tentative conclusion that lease rates based on the current highest implicit fee formula are too high or that demand for leased access is indeed too low. The Commission must not react so radically based upon mere speculation.

Furthermore, the Commission's proposed formula and rule changes are contrary to congressional intent and Commission policy. Congress had no desire to replace quality programming valued by subscribers, with low-value, duplicative leased access programming such as home shopping networks, infomercials and 900 number services. If the Commission were to implement the proposed rule changes, it would greatly reduce diversity of programming, with the cable industry and cable subscribers paying the price.

The Commission has already acted in recent rule changes and decisions to alleviate the procedural concerns of leased access commenters. Moreover, considering the large number of cable systems and programmers nationwide, there have been a relatively small number of leased access complaints filed with the Commission since the beginning of leased access, further evidencing the exaggeration of alleged problems with the highest implicit fee formula. Moreover, before adopting any rule changes, the Commission should await the Supreme Court's ruling on the

pending appeal of the "must carry" rules. That case could provide guidance for the Commission in evaluating the fundamental constitutional issues that have been raised in this proceeding.

If the Commission does proceed to change the rate formula, the NCTA proposal represents a compromise that is preferable to the massive subsidies for leased access programmers that would result from other radical rate reduction proposals made in this proceeding.

Other important issues are addressed in these Reply Comments, including the most critical problems that would occur if the Commission were to adopt its proposal to require cable operators to include commercial leased access programming on basic or the primary cable programming service ("CPS") tier. In addition, LPTVs should not be accorded preferential treatment by way of special access or rates. LPTVs are already provided by Congress with a complete statutory framework for access, as reflected in the Commission's must carry rules. Finally, there is strong support in the comments for a lengthy transition period for any new rules.

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JOINT REPLY COMMENTS OF CABLE TELEVISION OPERATORS

These Joint Reply Comments are submitted on behalf of the following large and small cable television operators and associations: Daniels Communications, Inc.; Greater Media, Inc.; Helicon Corporation; Marcus Cable Partners, L.P.; Prime Cable; Scripps Howard Cable Company; TCA Cable TV, Inc.; Texas Cable and Telecommunications Association; Allen's TV Cable Service, Inc.; Community Antenna Systems; Fibervision, Inc.; Halcyon Communications, Inc.; James Cable Partners, L.P.; and Moffat Communications Limited. These "Joint Commenters" include MSOs, as well as small cable operators, all of whom strongly oppose the proposed changes in the commercial leased access rules.

Introduction

In response to the Commission's NPRM, extensive comments have been filed by many parties representing various interests within the video marketplace. No factual basis has been established by any of these commenters to warrant implementing the radical rule changes the Commission has proposed. Moreover, no evidence has been provided to support the assertions that leased access demand is too low due to the current highest implicit fee formula.

The Commission must not interpret the leased access provisions of the Communications Act in a vacuum. The statutory framework was established in order to promote diversity of information sources,[1] but not at the expense of other equally important goals of the Act.[2] The proposed rules and rate formula will inflict significant economic harm on cable operators and will greatly increase subscriber dissatisfaction with current cable service offerings, causing defection of cable subscribers to alternative video providers.[3] Unless all costs and a reasonable profit are reflected in the maximum rate formula, the Commission will not fulfill either its goals or statutory obligations. Existing high quality programming will be reduced, new launches for distinct programming will be stalled, and cable operators will be hampered in their ability to meet the needs and interests of subscribers. The entire industry, including cable operators, programmers and subscribers, will suffer serious harm.

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[1] Communications Act, as amended, §612(a), 47 U.S.C. §532(a).

[2] *Id.* The purposes of § 612 are to "assure [that] the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the **growth and development** of cable systems." (emphasis added)

[3] Recently, 51% of cable subscribers surveyed cited "more, better programming" as the main reason they would consider dropping cable for an alternate provider. Thomas P. Southwick, *Are You Ready To Switch? You Bet . . . And Pricing Is The Key*, Cable World, at 178 (April 29, 1996).

The Commission should not be in the business of creating leased access demand out of thin air by skewing all market mechanisms through subsidies for leased access programming. A multitude of diverse cable programming sources already exists and subsidies for leased access programming are not necessary.

I. No Real Evidence Has Been Presented By Any Of The Commenters To Support The Proposed Changes To The Commission's Current Leased Access Rules. On The Contrary, Substantial Evidence Has Been Presented Showing Real Damage To Cable Operators And The Public If The Proposed Rule Changes Are Implemented.

No meaningful data was submitted by any commenter to justify the Commission's proposed maximum rate formula.[4] However, all of the comments that did provide actual data established the invalidity of the proposed formula.[5] Commenters providing such evidence outlined the real costs to cable operators when they replace high quality programming with lower value leased access programming and demonstrated that these costs were not being accounted for in the proposed formula.[6] The only reasonable conclusion from all of the comments is that the proposed formula would provide a massive subsidy to leased access programmers, enabling them to obtain

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[4] *See, e.g.,* Valuevision International Comments at 1-9; Visual Media Comments at 3-6; R.K. Production Comments at 3-6; The Game Show Network Comments at 6-11, 14; Center for Media Education Comments at 7-10; Hispanic Information & Telecommunication Network Comments at 7-12. All of the above were in favor of the proposed changes, but none submitted evidence justifying the radical proposal.

[5] *See, e.g.,* NCTA Comments at 10-15, Attachm. A; Time Warner Cable Comments at 11-21, Economic Analysis; US West Comments at 3-6; Adelphia Communications Comments at 6-15; Tele-Communications Inc. Comments at 12-19; Continental Cablevision Comments at 9-12; Cox Communications Comments at 3-18; Comcast Cable Comments at 3-14; Prevue Networks Comments at 3-9; Discovery Communications Comments at 5-10.

[6] *Id.* All of the above commenters provided ample justification that the Commission's proposal does not account for all of the cable operator's true costs.

a free ride on cable systems. The leased access proponents must acknowledge that conjecture is no substitute for real evidence.[7]

A conclusion firmly established by the comments is that the proposed leased access rules would require deletion of existing good quality programming from cable systems and prevent new launches of diverse programming because channel capacity on cable systems is already seriously limited. As noted by other commenters, most cable systems still have a capacity of 55 channels or less[8] and, by contrast, there are more than 128 cable programming networks.[9] In addition, as many as 80 new networks are expected to launch by the end of 1996, 62 of which (78%) are unaffiliated with any cable operator.[10] In total, as of April 1995, cable systems serving 67% of all cable households had no unused activated channels.[11] These numbers accurately depict the cable television market today and demonstrate that serious harm will occur if operators are forced to use their severely limited channel capacity for subsidized leased access programming that subscribers will not watch or support.[12]

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[7] *Turner Broadcasting Sys. Inc. v. FCC*, 512 U.S. ---, 129 L. Ed. 2d 497, 532, 114 S. Ct. 2445 (1994).

[8] *See, e.g.*, The Travel Channel Comments at 5 (citing NCTA Publication, *Cable Television Developments*, Spring 1996, at 10-11).

[9] *In Re Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming*, 2d Annual Report, CS Docket No. 95-61, FCC 95-491 (released Dec. 11, 1995) at ¶ 19.

[10] *Id.*

[11] The Travel Channel Comments at 6 (citing Arthur D. Little Report, *Availability of Channels in U.S. Cable TV Systems*, at 9 (April 1995)).

[12] A survey conducted by Time Warner Cable of its subscribers concluded that nearly 60% would not pay anything for leased access programming on their system. Time Warner Cable Comments at 3.

Another factor apparent from the comments is that the leased access regime is at odds with the fundamental economics of the cable programming business. Even Congress recognized that "the cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use."[13] Non-leased access programmers recoup their production costs primarily from licensing fees paid by cable operators in exchange for carriage, advertising revenues, and economies of scale from national distribution. Leased access programmers generally cannot take advantage of these revenue sources and, furthermore, they must pay the cable operator for carriage of their programming. It is not surprising that leased access programmers have limited financial resources to produce high quality programming that is able to attract an even moderate subscriber base. Therefore, the only programmers who can afford to program leased access channels are those who can recover their costs through product sales, i.e., home shopping networks and infomercial services. Many of the commenters, including even the shopping channels themselves, recognize that shopping and similar services are and will continue to be the primary users of leased access.[14] However, there is already a marketplace for infomercials and home shopping channels on cable and broadcast television. Any rate formula that would artificially promote increased channel time for these services is unnecessary and contrary to both congressional intent and the public interest.

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[13] S. Rep. No. 92, 102d Cong., 1st Sess., 31-32 (1992).

[14] *See* Shop at Home Inc. Comments at 4 ("Direct sales networks will be the primary beneficiaries of a decrease in leased access rates"); Time Warner Cable Comments at 3 (in-house survey stated that nearly 70% of all leased access programming on TW's systems are infomercials); Valuevision International, Inc. Comments at App. A, p. 1 ("We expect significant activity from home shopping/infomercial providers, substantive use by advertiser supported networks with the right economic structure . . . but probably little or no activity related to the launch of traditional full-time subscription services").

Congress also explicitly recognized that leased access capacity may not be fully utilized by leased access programmers and provided for such a scenario in § 612(b)(4) of the Communications Act. Congress concluded that any unused leased access capacity is to be available for programming selected by the operator. If Congress had intended for all leased access capacity to be used, it would have provided for such mandatory use in the language of the Act.[15] Instead, Congress intended for capacity to be used if and only if the demand exists for the leased access programming. The Commission's efforts to artificially create increased leased access use are contrary to congressional purpose and the Commission's long standing market based approach to regulation.

Finally, the Commission's proposed maximum rate formula and regulations would adversely affect the mix and quality of the programming offered by cable operators, leading to less diversity, fewer subscribers and lower revenues for operators and non-leased access programmers alike. Congress acknowledged this reality and stated that "if not properly implemented, leased access requirements could adversely impact the economic viability of a cable system, thereby hurting the public."[16] Therefore, Congress required the Commission to "look to the nature . . . of the service being propos[ed], how it will affect the marketing mix of existing services being offered by the cable operator to subscribers, as well as the potential market fragmentation that might be created and any resulting impact that might have on subscriber or advertising revenues" when establishing the "price, terms and conditions pursuant to this section [612(c)(1)]."[17] If the

[15] *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 633 (D.C. Cir. 1939).

[16] *Report of the Committee on Energy and Commerce on the Cable Franchise Policy and Com. Act of 1984*, at 50 (August 1, 1984).

[17] *Id.* at 51.

Commission proceeds hastily with its latest leased access proposals, the public and the cable industry will be the ultimate losers.

II. The Harm To Cable Subscribers And Programmers Must Be Considered By The Commission When Applying The Public Interest Standard To The Leased Access Rules.

"The basic charter of the Commission is, of course, to act in the public interest."[18] This standard is the cornerstone of all communications regulations. When determining the rules for commercial leased access, the Commission must abide by its charter. The public interest cannot be made tangential to any other issue that is before the Commission -- it must remain paramount. The public interest will not be served if the proposed rules and maximum rate formula are implemented.

First, subscribers will lose high-quality programming as inferior services are substituted for programming that the public has come to recognize and enjoy. There are numerous examples of cable systems where commercial leased access has replaced all or some portion of valuable existing programming, such as C-SPAN and C-SPAN II. Furthermore, the public will suffer service disruptions from unnecessary programming changes. The importance of the public's perception of cable service cannot be underestimated and the cable operator will inevitably be blamed for the carriage of non-valued programming. The public interest will not be served if subscribers are forced by FCC regulation to turn elsewhere because the cable operator is prohibited from maintaining the level of quality needed to maintain its subscriber base.

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[18] *Treasure Valley CATV Comm. v. United States*, 562 F.2d 1182, 1185 (1977)(citing *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (1958)).

Furthermore, the proposed rules and regulations will stunt the growth and innovation of new, diverse programming services. New networks will not have an opportunity to be carried when channel capacity becomes even more limited as leased access users climb aboard for their free ride. In addition, programmers will be unable to benefit from the contracts they entered into in good faith with cable operators in reliance upon existing conditions and demand for leased access.

III. If The Commission Proceeds To Change The Current Implicit Fee Rate Formula, The NCTA Rate Proposal Represents A Compromise That Would Reduce The Harm To Cable Operators And The Public.

In its Comments, NCTA proposed use of an "average channel rate formula" under which the current formula would be adjusted to account for the average license fee, rather than the lowest license fee, paid to the cable operator. If the Commission does act to reduce the current highest implicit fee formula, the NCTA proposal is preferable to any other suggestions that have been put forth in this proceeding to reduce leased access rates. The NCTA proposal would generally result in a reduction in rates, which would encourage leased access users. However, it would reduce the significant harm to the public and the cable operator that would result from the rate formula proposed in the NPRM.

IV. Preferential Treatment For Low Power TV Has No Sound Basis In Law Or Policy.

The Communications Act, already creates a preference for minority and educational programming in § 612. However, low power television stations ("LPTVs") were not included in § 612 as a group entitled to preferential treatment, either through special leased access rates or otherwise. LPTVs are in fact the recipients of another unique access guarantee under Congress' must-carry provisions. The must-carry rules provide for free carriage of LPTVs on cable systems, but impose detailed content requirements and market tests with specific limits carved out. It is within this regime only that Congress intended LPTVs to obtain any sort of preferential treatment for carriage on cable.

V. Cable Operators Should Not Be Required To Include Commercial Leased Access Programming On Basic Or The Primary Cable Programming Service Tier.

Congress did not intend specific tier or channel placement guarantees for leased access users, as it did with PEG channels, since leased access channels were not included as part of Congress' "basic tier" definition.[19] If Congress had wanted the term "genuine outlet" to mean the basic or CPS tier, it would have stated so clearly in the language of the Act.[20] There is no legal justification for requiring cable operators to carry leased access programming on their basic or CPS tier.

Furthermore, there are sound policy reasons for leaving the cable operator with tier and channel placement decisions. Subscribers purchase packages, not individual programming, and tiering is a vital tool when marketing existing and new programming to subscribers. If the quality of the tier is diluted, and the cable system's channel capacity is even further restricted by additional mandatory placement requirements, the operator will have little ability to maintain the necessary

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[19] *In the Matter of Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, 8 F.C.C. Rcd. 5631, 5939 at ¶ 498 (1993).

[20] *Supra*, n.15.

level of quality across any given tier. In addition to the Commission's proposed maximum rate formula, tier and channel placement requirements are the greatest threat to cable operators.

VI. Other Issues In Notice Of Proposed Rulemaking.

A. No Common Carrier Model

Several Commenters suggested designing the rate structure and the first come, first serve access guarantees based upon a common carrier model.[21] Such proposals are in direct contravention of Congress' statutory scheme for cable television. Cable operators were never intended to be regulated as common carriers and such treatment is prohibited by §621(c) of the Communications Act: "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."

Furthermore, the Supreme Court in *Midwest Video* held that previous Commission rules that 1) required cable operators to hold out specific channels on a first come, first serve, non-discriminatory basis, and 2) limited what operators could charge for access, resulted in de facto imposition of common carrier obligations on cable operators.[22] After this decision, Congress applied this rationale to leased access and stated in 1984 that, in terms of developing any new regulations relating to leased access, "the Commission should not see its role as that of a traditional common carrier regulator."[23] Requiring a cable operator to provide access to its system

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[21] *See* Adirondack Television Corporation Comments at 2; United Broadcasting Corporation, d/b/a/ Telemiami Comments at 22.

[22] *FCC v. Midwest Video*, 440 U.S. 689, 702 (1979).

[23] H.R. Rep. No. 934, 98th Cong., 2d Sess., at 54 (1984).

to any member of the public on a first come, first serve basis at regulated rates is classic common carrier regulation, which is prohibited by the Communications Act and case law.

B. Allegations Of Unresponsiveness

Several commenters claim that the cable industry has not been responsive to leased access users; however, there is no support for this charge. The Commission must realize that some leased access requests have presented extremely difficult situations for cable operators.[24] It is often a difficult task to evaluate leased access requests to determine which are legitimate. Genuine requests for access are often indiscernible from ones that are not. Cable operators are required to evaluate access requests from anyone, including those with no serious agenda or business to conduct. Indeed, it is clear from the limited number of leased access complaints the Commission has received since the adoption of the leased access requirements in 1984, that problems for leased access programmers have been greatly exaggerated. Only 71 leased access complaints have been filed with the Commission and hardly any have been filed in the federal courts.[25] Of these

[24] For example, in September 1995, Mr. Harry Tootle, d/b/a TootleVision, filed a request with the Departments of Justice and Interior requesting a grand jury criminal investigation of various private attorneys, employees of Prime Cable of Nevada and William F. Caton, Meredith Jones and several other FCC officials. The complaint stated that "known supporters of the Anti-Defamation League . . . have discriminated against me and my American Indian TV programming" and "certain agents and employees of the FCC have ignored the gravity of this matter, and may be implicated as co-conspirators." The charges listed were: fraud and false statements, perjury, conspiracy, conspiracy to violate civil rights, racketeering, obstruction of justice and treason, sedition and subversive activities.

[25] The Travel Channel Comments at 14.

71, 20 (28%) were filed by the same two parties.[26] Therefore, at most, only .7% of all cable systems have been the subject of a commercial leased access complaint.[27]

Several commenters also complained about the Commission's procedures and lack of clarity in the rules themselves. While there may have been some uncertainty, particularly with regard to procedural issues, the Commission's recent rule changes do make significant improvements in clarity and enforcement. The Commission has done a careful and thoughtful job deciding cases and making the recent rule changes. Therefore, the current rules and clarifications should be given the opportunity to work before such a radical overhaul of the leased access system is even considered by the Commission.

C. FCC Proposal For Initial Decision By Independent Accountant

The NPRM proposed a dispute resolution process that would involve review of the operator's rate calculations by an independent CPA. We strongly urge the Commission to reject this proposal, unless it establishes safeguards against abuse. A mandatory procedure for hiring an additional CPA will lead to abuses of the process and the development of a new cottage industry of consultants whose primary objective will not be to resolve the proceedings efficiently, but rather to drag out and complicate the process, which will increase the costs for all participants.

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[26] *Id.* at 14-15. Lorelei Communications Inc. and Karl Schroll were the referenced complainants. All five of Mr. Schroll's complaints were dismissed. Moreover, many of the issues raised by Lorelei in its numerous filings have been resolved by the Commission's revised leased access rules (i.e. clarification regarding part-time use, required operator response time to inquiries). Finally, five other complaints were dismissed by the Commission and of the remaining 46 complaints, at least seven address issues unrelated to the maximum rate under the highest implicit fee formula.

[27] Time Warner Comments at 8.

Furthermore, the current proposal for prior review by an independent CPA would be cumbersome, expensive and time consuming. particularly for smaller operators and small cable systems who have a smaller subscriber base over which to spread the cost. At the very least, if the Commission decides to institute some type of dispute resolution procedure utilizing an independent CPA, it must be applied only with the consent of the cable operator.

D. Transition Period Is Essential

In adopting its initial leased access rules, the Commission acknowledged that the rules were a "starting point" that would require further refinement both through the rulemaking process and as the Commission addressed issues on a case-by-case basis.[28] Most of the difficulties in implementation of leased access to date have arisen from confusion in FCC rules that were admittedly just a "starting point." The Joint Commenters believe that the drastic proposals urged by the Commission and several commenters are simply unwarranted and that the newly clarified rules should be given an opportunity to work. In addition, before adopting any changes in its leased access rules, the Commission should await the ruling by the U.S. Supreme Court in the current appeal of the FCC must carry rules. Any other action that subsidizes and artificially increases leased access usage beyond marketplace demand, will disrupt cable systems and their subscribers and will encourage commercial leased access users to invest in businesses that rely on subsidies and rules that are likely to be found unconstitutional.

At a minimum, if the Commission does act to lower leased access rates there must be a reasonable transition period (e.g. four years) to facilitate introduction of those new rates and

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[28] *Supra*, n.17 at ¶ 491.

to minimize disruption to subscribers as valued existing services are dropped to make way for leased access programming. The Commission seems to recognize such a transition period is necessary for these reasons, as well as to accommodate existing programming contracts. In addition, the transition will allow for the completion of cable system rebuilds over the next several years with additional channel capacity to better accommodate the lease of channels.

Conclusion

In view of the foregoing, the Commission should maintain the current "highest implicit fee" formula with no tier or channel placement requirements. It is premature to arrive at any conclusions as to the success or failure of the existing rules, particularly since the most recent rule changes to encourage access users were adopted less than two months ago. However, if changes are adopted by the Commission, they should be based on the NCTA proposal.

Respectfully submitted,

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